

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>HEIDI STEINER</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>WESLEY MEDICAL CENTER, LLC.</b>	)	
Respondent	)	Docket No. <b>1,043,126</b>
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the May 5, 2011, Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 2, 2011. The Division of Workers Compensation's Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Julie A.N. Sample.

**APPEARANCES**

Melinda G. Young of Hutchinson, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The claimant, a registered nurse, had a history of treatment for various allergies and had been diagnosed with a latex allergy before she became employed with respondent. Although respondent had attempted to eliminate latex from the emergency room where claimant worked, claimant alleged that she observed latex tourniquets and gloves in the facility and suffered an allergic reaction due to the latex exposure. Claimant alleged she suffered either personal injury by occupational disease or an accident arising out of and in the course of her employment. And she further alleged that as a result of the exposure

to latex she suffered a 36 percent functional impairment.<sup>1</sup> Respondent argued that claimant failed to establish she suffered either an occupational disease or an accident arising out of and in the course of her employment. In the alternative, respondent argued that claimant failed to establish she suffered any additional permanent impairment as a result of the alleged exposure to latex.

The Administrative Law Judge (ALJ) determined claimant did not meet her burden of proof to establish she suffered an occupational disease. However, the ALJ determined claimant met her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment. But the ALJ concluded claimant did not suffer any permanent impairment or disability as a result of her work-related accidental injury.

Claimant requests review of the nature and extent of claimant's disability. Claimant argues she has suffered an additional 36 percent permanent partial functional impairment due to her repeated exposure to latex.

Respondent requests the Board to affirm the ALJ's Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is significant that before claimant began work for respondent she had a longstanding history of diagnosis and treatment for allergies including a determination in 2003 that she was specifically allergic to latex. But even before her latex allergy was confirmed claimant had noticed problems in 1993 from using latex powdered gloves. Claimant sought treatment in 1998 with Dr. Kamlesh Shah, an allergist, and tested strongly positive to trees, grasses, weeds, molds, dust mite, farm pollens, horses and was also positive to dust, cats, dogs and soy bean. Claimant began immunotherapy treatment for her allergic rhinitis, allergic conjunctivitis and atopic dermatitis.

In 2003, when claimant's latex allergy was confirmed, she was working as a nurse in Wyoming. Claimant's hands, arms, face, neck and upper chest would be red, swollen and itching. These symptoms were worse at work than at home. Due to her diagnosis of the latex allergy, claimant filed a worker's compensation claim in Wyoming. Dr. Karin Pacheco evaluated and treated claimant after this exposure and ultimately opined claimant had a 28 percent permanent partial functional impairment. Claimant received an award in her Wyoming workers compensation claim based upon this functional impairment.

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<sup>1</sup> The claimant only sought compensation for functional impairment under either alternative that she suffered an occupational disease or that she suffered accidental injury.

Claimant began working full time as an emergency room staff nurse for respondent in July 2008. Claimant testified that she had a preexisting latex allergy but understood that she could continue to work around latex as long as she did not come into contact with it. Claimant testified:

Q. And what do you understand or what did you understand at that time your restrictions to be?

A. That I could work in an environment where other staff members continued to use latex exam gloves and latex products. I was not to use those personally. If there was a situation where I needed to use latex gloves I had to don nonlatex, be it Nitrolin or vinyl gloves which are available, don those first, then place latex gloves on top of those gloves. And they had to be nonpowdered latex gloves. I could perform my duties, take the gloves off, both sets obviously, and then go wash my hands. If someone was using powdered latex gloves I was not to be in the room when they were being used. I could enter after the procedure was done and all of those gloves were in the trash. Things such as tourniquets, blood pressure cuffs are common for latex products in them. And I could use those as long as I had a nonlatex barrier between my hands and those objects.<sup>2</sup>

Even though claimant had to work in a latex-safe environment, she was still able to find employment. At the time claimant was hired by respondent she was advised by the ER manager that it was a latex-safe environment. But claimant testified that latex tourniquets and sterile gloves were still being used in the emergency room.

Claimant testified that within a month after she began working in the emergency room she noticed that she began having itchy eyes, a runny nose and her skin was red. The more consecutive days that she worked, the symptoms increased. But when she was at home for consecutive days her symptoms improved. Claimant notified respondent's ER manager regarding her symptoms and asked why there were latex tourniquets and gloves still being used.

Shane Cash, respondent's clinical resource director, testified that he was emergency room manager during the time of claimant's exposure to latex from July 2008 to November 2008. Mr. Cash interviewed the claimant and then she was hired as a staff nurse for the emergency room department.

Q. Tell me about the emergency room in July 2008 when she was hired. Specifically, tell me was the emergency room at Wesley latex safe?

A. Yes.

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<sup>2</sup> R.H. Trans. (Sep. 23, 2010) at 13-14.

Q. What does that mean to you as latex safe?

A. That efforts have been made to remove latex from the environment.

Q. What efforts were made in the emergency room to remove latex from the emergency room environment?

A. Supplies.<sup>3</sup>

Mr. Cash testified that he was aware that claimant was allergic to latex. On October 9, 2008, Mr. Cash responded to claimant's email regarding the latex tourniquets and gloves that were in the emergency room department. After claimant notified respondent that there were latex tourniquets in the emergency room, Mr. Cash immediately found one box of latex tourniquets in a cabinet. This was the first time Mr. Cash was aware of the latex issues. On October 15, 2008, Mr. James Robinson, respondent's material manager, sent an email to the emergency department distribution list regarding latex tourniquets indicating that the latex tourniquets would no longer be available. And Mr. Cash testified that he did not observe claimant's arms, neck, face and hands being irritated by the latex allergy.

On October 31, 2008, Dr. Dobyns diagnosed claimant with an allergic dermatitis and she received a prescription for Medrol Dosepak. Then on November 12, 2008, claimant was examined by Jane Kauffman, ARNP, who diagnosed claimant as having chronic dermatitis secondary to latex allergy. Prednisone and Singulair were prescribed and claimant was to follow up if needed. Dr. Dobyns released claimant from his care on November 29, 2008.

Dr. Stanley Capper, a board certified dermatologist, examined and evaluated claimant on August 19, 2009, at respondent's attorney's request. The doctor reviewed Dr. John Schlicher (his previous partner's records) regarding claimant's office visits from June 25, 2001, February 3, 2003 and March 4, 2003.<sup>4</sup>

On June 25, 2001, Dr. Schlicher examined claimant due to complaints of recurrent episodes of pruritus or itching, redness, scaling dermatitis on the hand, dorsum of her hands, neck and face as well as deep bleeding fissures occasionally on her hands. The doctor diagnosed claimant as having atopic dermatitis with most being hand eczema. Dr. Schlicher did not opine as to causation on the first visit. The next visit claimant received an additional antibiotic and hydroxyzine with a diagnosis of acute and chronic atopic dermatitis. On March 4, 2003, claimant returned to see Dr. Schlicher due to her atopic

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<sup>3</sup> Cash Depo. at 7.

<sup>4</sup> Capper Depo., Ex. 1.

dermatitis which had improved considerably. A change in skin cream was made and claimant should return in three months for a follow-up visit.

Dr. Capper reviewed claimant's medical records from 2003 to 2009. The doctor opined that claimant's dermatitis cannot be cured but only the symptoms are alleviated with medication. Upon physical examination, Dr. Capper found atopic eczema changes in the bend of her arms and hands with mild lichenification but no signs of infection. Lichenification means elephant hide or rhinoceros hide. It's very tough thickening area of the skin which is hard like a callus. Claimant was diagnosed with lichenification in her previous medical records of Drs. Shah and Pacheco. Dr. Capper further testified:

Q. So is latex -- exposure to latex, is this what is causing her to have the atopic dermatitis or is it the body's response to certain stimulus no matter whether it's latex or some other things? That's kind of a bad question, but --

A. Right, it can be. What I say is that an atopic individual is a very sensitive person and when they are little kids and so on they are stimulated by a lot of things and so parents will think that they are hyperactive, because they are very sensitive and they are stimulated by light and noise and movement and everything, and it's because they are an atopic individual, it's not because they are extra sensitive. I mean they are hyper, that makes them hyper, so they can break out to anything, you know, and I also -- the other part of my treatment then, I didn't even give you my treatment, what I usually tell them, but they usually get an internal antibiotic, internal anti-itch, external cream and no hot soapy water. And then I also tell them that they need to wear white cotton gloves, and rubber gloves over that every time they are in hot soapy water, peeling fruits, vegetables, raw meats, any kind of cleaning work or hobby chemicals, they just have to avoid that or they are going to break out.

Q. And when they break out, is it something that's going to stay forever, or if you stay away from those stimulus, will those symptoms then eventually go away?

A. They will go away, uh-huh.<sup>5</sup>

Dr. Capper testified that claimant's employment with respondent did not cause her latex allergy because she has had it for years.<sup>6</sup> Moreover, Dr. Capper testified that claimant's latex exposure at respondent's emergency room did not cause any permanent impairment. Dr. Capper testified:

Q. Did the tourniquet contact that she alleges she had in October of 2008 cause any permanent change to her physical condition?

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<sup>5</sup> Capper Depo. at 20-21.

<sup>6</sup> *Id.* 23.

A. No.

Q. Did it cause any permanent aggravation of her condition or accelerate her condition?

A. No.

Q. Did it temporarily exacerbate her condition?

A. Yes.<sup>7</sup>

Dr. Capper opined that claimant did not need any specific treatment due to her latex exposure with respondent. The doctor further opined based upon the *AMA Guides*<sup>8</sup> that claimant did not suffer a permanent impairment due to her latex exposure in October 2008. The doctor opined that claimant's restrictions should not be any different than those that Dr. Pacheco had placed on claimant. Dr. Capper opined that there is not a latex free environment because latex is everywhere. Such as items that contain rubber, elastic or stretches as well as tires and carpeting. Dr. Capper further testified:

Q. Okay. Would that be an indication, Doctor, that -- when you saw Ms. Steiner, that there would be at least some level of exposure to latex that she can tolerate, because she wasn't breaking out at the time that you saw her, but it depends on what that level is?

A. Sure, yeah.

Q. Okay. But when she'd have direct contact with such as a rubber glove or in her case she complained of the tourniquet, that may cause her to flare?

A. Yes.

Q. But once again if she removes herself from that exposure, the flare should go away, would that be true?

A. Correct.<sup>9</sup>

On cross-examination, Dr. Capper opined that if claimant has repeated flares that she should be removed from the exposure and that flare should go away.

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<sup>7</sup> *Id.* 24.

<sup>8</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

<sup>9</sup> Capper Depo. at 30-31.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation as well as electrodiagnosis and independent medical evaluations, examined and evaluated claimant on June 24, 2010, at claimant's attorney's request. The doctor reviewed claimant's medical records and also took a history. Claimant complained of itching and burning of the hands and arms. Upon physical examination, Dr. Murati noted claimant had discoloration of the skin on her neck line and the dorsal aspect of the hands consistent with lichenification. The doctor did not observe any rashes at that time. Dr. Murati diagnosed claimant as having an aggravation of chronic latex allergy which was a direct result of her work-related injury on October 14, 2008. He recommended that claimant avoid all latex products and irritative products as well as to continue using Cerave products.

Based on the *AMA Guides*, Dr. Murati opined claimant sustained a 54 percent whole person impairment. Due to her previous 28 percent impairment, claimant sustained an increase of 36 percent whole person impairment due to her work-related aggravation.

Dr. Murati opined that claimant was still in Class 3 (table 2, page 280) of the *AMA Guides* as she had been when rated by Dr. Pacheco but that she is now at the maximum percentage of 54, which using the combined value charts of the *AMA Guides* results in a 36 percent whole person functional impairment. Consequently, the doctor opined that claimant has an increase of 36 percent in her whole person functional impairment rating due to this aggravation. Dr. Murati testified:

Q. And you were just referring to that she was in a Class 3 and that, in fact, she was a Class 3 before you saw her, correct?

A. Right.

Q. And what do you -- can you explain what the difference is for -- or what classifies someone in a Category 3?

A. Well, if you read it, and I'll quote, it says, "Signs and symptoms of skin disorder are present or intermittently present," which she has, "and there is limitation in the performance of many of the activities of daily living," which she has. She cannot really work in an ER setting. I don't think she can work in a hospital setting ever again.

And the third one says "Intermittent to constant treatment may be required," and she has to use a lotion. So she meets all those three. The thing is she was a 3 before the aggravation, but I think it's gotten worse.<sup>10</sup>

Dr. Murati opined that claimant cannot go back to hospital work. But Dr. Murati testified that claimant is capable of performing her daily living activities even though she

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<sup>10</sup> Murati Depo. at 18-19.

has the latex allergy. He also testified that claimant's restrictions didn't change after June 2004.

Claimant testified that it takes very little exposure to latex or irritants before symptoms occur and that she tries to avoid as much latex as possible because there are a lot of things in the environment that may contain latex. Finally, it should be noted that after claimant left respondent's employment she began working as an emergency medical technician and is employed by Craig Home Care as a home health nurse.

Initially, claimant argues that she suffered an occupational disease due to her exposure to latex while working for respondent.

K.S.A. 44-5a01(b) states in part:

"Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases.

Generally speaking, an occupational disease must (1) arise out of and in the course of employment; (2) result from the nature of the employment; and (3) have been actually contracted while engaged in the employment. In addition, before the disease may be considered occupational, the employment must hold a particular or peculiar hazard to acquire such disease which distinguishes the employment from other occupations and employment, and which creates a hazard of acquiring such disease which is in excess of the risk of such disease in general. Also, the occupational disease statute excludes from the definition of occupational disease ordinary diseases of life to which the general population may be exposed.

It was uncontroverted that claimant's allergy to latex was preexisting and consequently was not contracted from her employment with respondent. Claimant's allergic condition can more accurately be defined as an ordinary disease of life to which the general public may be exposed to outside of a particular employment. The evidence in this case established that latex is used in everyday items from carpeting to elastic in



underwear. And claimant suffered allergic reactions to latex occurring in common everyday items not specific or peculiar to the workplace.

Furthermore, it is difficult to say claimant's conditions constitute an occupational disease when they are both the result of a risk of employment and ordinary diseases of life. In *Casey*,<sup>11</sup> the Kansas Court of Appeals acknowledged that some compensable injuries are a hybrid containing elements of both a work-related accident and an occupational disease. This case is analogous to *Casey* in that although the employment presented an increased risk, it is difficult to characterize that risk as a "special risk" when the general public also is or may be exposed to the same conditions or diseases outside of the particular employment. In *Casey*, as in this case, there was a preexisting allergic condition. And following exposure to the allergen in the workplace there was an allergic reaction. The dispute arose whether *Casey* had suffered an occupational disease and the Court of Appeals stated:

We agree with Dillons that *Casey*'s allergic condition more closely meets the definition for an "ordinary disease of life" and conditions which the general public may be exposed to outside of a particular employment, which is not compensable as an occupational disease. Not everyone suffers from allergies. However, the allergic reactions suffered by *Casey* constitute an ordinary disease of life by those who are afflicted. Furthermore, we are not dealing with any generally recognized toxic substances in this case. *Casey*'s allergic reactions are common everyday items not specific or peculiar to the workplace; thus, her development of allergies to these substances has not been proven to have resulted from her employment.

In this case claimant was not dealing with toxic substances rather she simply had an allergy to latex and that allergy was not limited to latex items found only in the workplace but included common items found outside the workplace. The Board finds claimant has failed to meet her burden of proof that she suffered an occupational disease.

Claimant next argues that she suffered an accidental injury due to her exposure to latex at the workplace. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>12</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or

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<sup>11</sup> *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 73-74, 114 P.3d 182, rev. denied 280 Kan. 981 (2005).

<sup>12</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

accelerated the condition.<sup>13</sup> Claimant detailed the instances that she observed latex tourniquets in the emergency room where she worked. Conversely, Mr. Cash testified that the facility was essentially latex free and after claimant's complaints he conducted a search which only turned up one package of latex tourniquets which were in a storage cabinet. The ALJ determined that claimant had met her burden of proof to establish that she suffered accidental injury due to her exposure to latex in the workplace which aggravated her preexisting condition. The Board agrees and affirms.

Claimant next argues that as a result of her exposure to latex while working for respondent she has suffered a 36 permanent partial functional impairment.

Dr. Murati opined that claimant's condition had worsened and she now has a 54 percent whole person functional impairment which would calculate to an increased impairment of 36 percent above the 28 percent preexisting impairment using the combined value charts of the *AMA Guides*. Conversely, Dr. Capper opined that claimant's condition had returned to the baseline before the exposure and, consequently claimant did not suffer any additional permanent functional impairment. The ALJ found Dr. Capper's opinion more persuasive and determined claimant suffered a temporary injury with no permanent impairment.

When Drs. Murati and Capper each examined claimant she was not suffering from an allergic reaction and their physical examination findings were the same as Drs. Shah and Pacheco had made years previously. Stated another way, claimant's allergic reaction had subsided and her symptoms had returned to baseline. Consequently, claimant's work-related injury was temporary. Moreover, it must be noted that Dr. Murati's opinion of an increase in claimant's permanent functional impairment was not based upon any objective change in claimant's condition but instead was based upon his assertion that claimant could no longer work in a hospital setting. And Dr. Murati agreed that claimant's restrictions had not changed from those she had before her employment with respondent and those restrictions allowed claimant to work in a latex safe environment. The evidence established that after leaving work for respondent claimant has continued to work as an emergency medical technician and home health care nurse which obviously would place her in situations similar to a nurse in a hospital. Finally, Dr. Murati was unaware that respondent had changed to a latex free environment. The clearly more persuasive medical evidence in this case was provided by Dr. Capper who opined claimant had merely suffered a temporary injury with no permanent impairment. The Board affirms the ALJ's Award.

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<sup>13</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>14</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 5, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>14</sup> K.S.A. 2010 Supp. 44-555c(k).